Did Turkey's Recent Emergency Decrees Derogate from the Absolute Rights?

Ali Yildiz 2019-09-28T14:01:42

I. Introduction

States, like people, have an instinct to protect themselves when in a life-and-death struggle. The recognition of a state of emergency, or of siege, in the domestic legal order, dates back to at least Roman times. Today, the primary international human rights treaties include a derogation clause in relation to emergency situations. (Art. 15 ECHR; Art. 4 ICCPR, Art. 27 American Convention on Human Rights). To date (2019), nine States who are parties to the ECHR have invoked the derogation clause, and the number is more than thirty for those who are parties to the ICCPR.

A duly proclaimed emergency regime relieves States from certain obligations that are laid down by their national laws and international human rights treaties, and also diminishes the separation of power by having altered the functioning of state organs. More precisely, the declaration of a state of emergency involves the transfer of additional powers to the executive, to the detriment of the judiciary and the legislative. Consequently, the most grave and systematic human rights violations often occur during periods of an emergency regime. This was and is the case in Turkey, after a state of emergency was declared by the Turkish Government on 20/07/2016, following a coup attempt by a small group in the Turkish Armed Forces.

On 20/07/2016, the Turkish Government declared a state of emergency for three months, under Article 120 of the Turkish Constitution, and Article 3 of the Act on the State of Emergency (No: 2935). The Grand National Assembly of Turkey (TGNA), approved the decision of the Council of Ministers on 21/07/2016. Both decisions were duly published in the *Official Gazette*. On the very same day, in pursuance of Article 15 ECHR and Article 4 ICCPR, the Turkish Government notified the Secretary General of the Council of Europe and the Secretary-General of the United Nations about derogations from the ECHR and the ICCPR.

This essay explains that although the Turkish Government observed procedural rules laid down by national and international law on declaring a state of emergency, its way to use emergency powers was not in compliance with national and international law, as it contradicts non-derogable rights laid down in the Turkish Constitution and the ICCPR and the ECHR which Turkey is party to.

II. General Overview of Emergency Decrees (ED) Adopted Between 21/07/2016 and 19/07/2018

Under Turkish law, the most significant consequence of declaring the state of emergency is the empowerment of the Cabinet to adopt Decrees, which have the force of law without the *ex-ante* authorization of the Parliament (TGNA). Pursuant to article 121§3 of the Turkish Constitution, during the state of emergency, the Council of Ministers, meeting under the chairmanship of the President of the Republic, may issue Decrees with the force of law, on matters that are necessitated by a state of emergency.

During the emergency rule (2016-2018), the Turkish Government enacted thirty-two Emergency Decrees. Seventeen of those targeted certain real and legal persons, and adopted permanent measures relating to them. With these Emergency Decrees, 125.678 individuals were dismissed from public service, more than 4,000 legal persons (foundations, associations, universities, trade unions, private hospitals, private schools, media outlets) were closed down. The assets of all those legal persons were transferred to the Treasury without cost, compensation and/or any obligation or restriction *(see*, Art. 2 of EDs, Nos. 667-668; Arts. 5 and 10 of ED, No. 670; Art. 3 of EDs, Nos. 677& 683). Besides the measures targeted at tens of thousands of real and legal persons, Emergency Decrees led to over 1,000 permanent amendments to national laws.

III. The Measures Interfering in Absolute Rights

The Right to Life and the Prohibition of Torture

The right to life and the prohibition of torture are non-derogable under Article 15§2 of the Constitution, Article 4§2 ICCPR and Article 15§2 ECHR. However, various impunity clauses which were introduced with the Emergency Decrees by the Cabinet, have resulted in the *de facto* derogation from the right to life and the prohibition of torture.

The very first Emergency Decree (no. 667, Art. 9§1) stipulated that “legal, administrative, financial and criminal liabilities shall not arise in respect of the persons who have adopted decisions and who fulfill their duties within the scope of this Decree Law”. Emergency Decree no. 668 (Art. 37) has further expanded this principle of impunity, specifying that there will be no criminal, legal, administrative or financial responsibility for those making decisions, implementing actions or measures, or assuming duties as per judiciary or administrative measures for suppressing coup attempts or terror incidents, as well as individuals taking decisions or fulfilling duties as per State of Emergency Executive Decrees. By Emergency Decree no. 696 (Art. 121), the impunity provided to public servants under Emergency Decrees nos. 667-668, was also extended to civilians. More precisely, it was stipulated that those civilians acting to suppress the coup attempt of 15/7/2016 and the ensuing events will have no legal, administrative, financial or criminal

responsibility. What is more, all these three decrees were approved by the TGNA and have become ordinary laws (Law Nos. 6749, 6755 and 7079).

Under these provisions, public prosecutors have given non-prosecution decisions on criminal complaints that were filed for alleged murder and torture incidents. The Trabzon Prosecutorial Office thus gave a non-prosecution decision under Article 9 of Emergency Decree no. 667 regarding a complaint filed by an alleged torture victim. Likewise, the Istanbul Prosecutorial Office gave a non-prosecution decision on a complaint that was filed by the family members of a military cadet who was tortured and murdered by civilians during the coup attempt. Further to this, since the failed coup attempt, wide-spread torture and ill-treatment incidents have been reported in Turkey by the United Nations' High Commissioner for Human Rights, the UN Special Rapporteur on Torture, Human Rights Watch as well as many other credible institutions. Last, but not least, since the enactment of Emergency Decree no. 667, twenty-four enforced disappearance incidents have been reported in Turkey.

The right to life and the prohibition of torture impose a positive obligation on State parties to the ECHR and ICCPR, as well as a negative one. The positive obligation concerning the right to life requires the State parties to take appropriate steps to safeguard the lives of those under its jurisdiction, and to apply this in the context of any activity, whether public or not, in which the right to life may be at stake. Likewise, the State parties are under the obligation to prevent torture and ill-treatment. These obligations also require the carrying out of an effective investigation when the right to life or the prohibition of torture has been breached. The ECtHR has affirmed, in the case of *Marguš v. Croatia*, that:

> "granting amnesty in respect of the killing and ill-treatment of civilians would run contrary to the State's obligations under Articles 2 and 3 of the Convention, since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible."

In conclusion, the impunity clauses introduced within the emergency measures, and their interpretation and implementation by law enforcement forces, judges and prosecutors, have resulted in a *de facto* derogation of the right to life, and to the prohibition of torture, which is clearly illegal under the Constitution, the ICCPR and the ECHR.

The Prohibition of Retroactive Punishment and the Principle of No Punishment Without Law

The prohibition of retroactive punishment and the principle of no punishment without law are non-derogable according to the Turkish Constitution (Arts. 38 and 15§2), the ECHR (Arts. 7 and 15§2) and the ICCPR (Arts. 15 and 4§2).

Seventeen Emergency Decrees justified the measures that sanctioned both natural and legal persons for:

(i) having 'membership, affiliation, relation or connection to' the 'Fetullahist Terrorist Organization (FETO/PDY), or

(ii) having ‘membership of, affiliation, link or connection with terrorist organizations or structures, formations or groups which have been established by the NSC to perform activities against national security of the State’.

Turkish Laws criminalize only the membership of a terrorist organization (Art. 314, Turkish Penal Code). That is to say, neither ‘affiliation, relation, link or connection’ to a terrorist organization, nor ‘structures, formations or groups which perform activities against the national security of the State’ are crimes under Turkish Law. Moreover, the Law on the National Security Council (NSC) (Law no. 2945, Art. 3) does not empower the NSC to designate a group as a terrorist organization, nor as a group performing activities against the national security of the State. The authority to designate an organization, a structure, a body, etc., as a terrorist organization, is exclusively vested in the judiciary by Article 138 of the Constitution. And the final judgment that characterizes the Gulen Structure as a terrorist organization was rendered on 26/09/2017 (General Chamber of the Court of Cassation, Decision No: 2017/370). Moreover, even if it is assumed that the NSC has the authority to make such a designation, it did not explicitly designate the Gulen Structure as a terrorist organization until 20/07/2016.

One can argue that, under the *Engel criteria* , Article 7 ECHR does not cover the dismissals under the Emergency Decrees. However, taking into consideration the *Matyjek v. Poland* judgment, which established that the prohibition on practicing certain professions for a long period of time should be regarded as having at least a partly punitive character, Turkey’s Dismissal Decrees can be regarded as being within the first limb of Article 7 ECHR. Furthermore, the High Election Board’s decision (2019/2363, 10/04/2019) which prevents the dismissed public servants from assuming elective offices, overlaps with the consequences of being convicted under the Turkish Penal Code, and therefore a dismissal might be regarded as a punishment rather than an administrative (preventive) measure.

In conclusion, considering that:

(i) Turkish laws do not criminalize the ‘affiliation, connection, relation and link’, but do criminalize only membership to a terrorist organization,

(ii) the life-time ban for working in the public service that is sanctioned by the Emergency Decrees, which may compromise private sector employment as well, can be regarded as falling within the first limb of Article 7 ECHR,

(iii) until the 15/07/2016, coup attempt, the Turkish Government did not explicitly mention the Gulen Structure as being a terrorist organization or a group performing activities against the national security of the State, through official means,

(v) the final judgment that designates the Gulen Structure as a terrorist organization was rendered on 26/09/2017,

(vi) the criteria used to determine ‘membership, affiliation, connection, relation and link’ of the Gulen Structure, or to the group established by the NSC as performing activities against the national security of the State, consists of either legitimate

relations with legal persons that are incorporated or founded under Turkish law, or intelligence reports,

(vii) Disciplinary liability, or any other similar measure, should be foreseeable; a public servant should understand that he/she is doing something that is incompatible with his/her status, in order to be disciplined for it,

it can be argued that Turkey's Emergency Decrees that were enacted between 2016 and 2018 constitute a violation of the prohibition on retroactive punishment and the principle of no punishment without law, which are non-derogable under the ECHR, the ICCPR and the Constitution of Turkey.
